No. 2966

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BADER GOLD MINING COMPANY
(a corporation),
Appellant,

vs.

ORO ELECTRIC CORPORATION
(a corporation),
Appellee.

BRIEF FOR APPELLEE.

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Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLEE.

This suit was brought in the United States District Court for the Northern District of Calfornia by Oro Electric Corporation against Bader Gold Mining Company to obtain a decree quieting complainant's title to a certain ditch in Butte County, California, used by it in its business of supplying water to the public for irrigation and in generating hydro-electricity, and to obtain an injunction restraining the defendant from interfering with said ditch or taking water therefrom.

The case was heard by the Standing Master in Chancery of the United States District Court for

the Northern District of California, under an order of said court (made upon a stipulation of the parties), authorizing him "to take and report the testimony, together with his findings and conclusions thereon" (Tr. p. 18). In the report of the Master, it is said:

> "What the defendant calls a narrative of facts was intended by the Master to be the findings of fact in issue which the order of reference requires me to report, and to obviate any doubt upon the matter I find the facts as stated in the foregoing report" (Tr. p. 64).

All of the disputed questions of fact involved, were found in favor of the complainant. These findings, therefore, as we understand the rule, cannot now be made the subject of successful attack.

> *Last Chance Mining Co. v. Bunker Hill etc. Co.,* (C. C. A. 9th Cir.) 131 Fed. 579, 587;
> *Davis v. Schwartz,* 155 U. S. 631; 15 Sup. Ct. 237, 239; 39 L. Ed. 289.

In the statement of facts set forth in appellant's brief, the above rule is wholly disregarded. It becomes necessary, therefore, to restate here the facts as they were found by the Master, and established by the overwhelming weight of the evidence.

Statement of Facts.

The Nickerson Ditch was constructed by A. A. Nickerson in the fall of 1888 and the spring of 1889, long prior to the date of the acquisition by

defendant of the title to its property and the issuance of the patent therefor (Findings, Tr. p. 46). Mr. North, who constructed it, and who testified as a witness on behalf of defendant, stated that as constructed its depth below the "thorough-cut", or graded surface, was three feet, its width on the bottom was three feet, and its width on the top was five feet (Tr. p. 128). The grade, he also testified, was 9.60 feet to the mile (Tr. p. 133). A ditch of these dimensions would have a capacity of 1740 miner's inches (Tr. p. 193). Mr. North further testified that as originally constructed the ditch extended from its intake in Little Butte Creek to the Magalia and Chico Road below the property now owned by defendant (Tr. p. 128).

For many years prior to the construction of said ditch, a ditch known variously as the Powers Ditch, the West Ditch, the Walker and West Ditch, and the Thompson Flat Ditch—and which will be hereinafter referred to as the "Powers Ditch"—having its intake in Little Butte Creek at a point about a mile below the present intake of the Nickerson Ditch, had taken water from said creek and carried it in a southerly direction to the vicinity of Oroville, where it was used for hydraulic mining and other purposes (Findings, Tr. p. 48). At about the time the Nickerson Ditch was constructed, however,—the finding is "about the year 1890" (Findings, Tr. p. 90)—the upper portion of the Powers Ditch fell out of repair and was abandoned, and from that day to this, the Nickerson Ditch

(except at periods of high water), has carried all of the water of Little Butte Creek. "It is absolutely clear on the evidence, despite much contradictory evidence," said the Master in his report, "that after 1890, when the Powers Ditch went out of repair, the Nickerson Ditch took all of the water in summer flowing in Little Butte Creek at the Nickerson Dam" (Tr. p. 50). The Master further found "that all taxes since 1888 assessed against the Nickerson Ditch have been paid by the plaintiff or its predecessors and that no taxes on said ditch have been paid by the defendant" (Tr. p. 60).

It may be also mentioned here that while the upper portion of the Powers Ditch was thus early abandoned, this was not the case with the lower portion of it. On the contrary, the record shows that shortly after the Nickerson Ditch was constructed, it was connected with the lower portion of the Powers Ditch, and thereafter a part of the water carried through the Nickerson Ditch was transferred over to the lower part of the Powers Ditch, and thus carried on to a point near Oroville, as in the days before the construction of the Nickerson Ditch (Findings, Tr. p. 49; Tr. p. 251).

Nickerson's title to the ditch and the water right appurtenant thereto passed by mesne conveyances through various hands until, on April 30th, 1898, it became vested in Oroville Water Company, which, on August 15th, 1905, conveyed said property to Oro Water Light and Power Company, which in turn transferred it to complainant by deed dated

March 12th, 1912 (Findings, Tr. p. 47). For many years, the ditch has been used by complainant and its predecessors during the irrigating season in supplying water for irrigation to a prosperous agricultural community in Butte County below defendant's land, known as Paradise Valley. In the winter, the water is stored in one of complainant's reservoirs termed the Kunkle Reservoir, whence it is conveyed to the hydro-electric plants of complainant which supply the City of Oroville and its inhabitants with electricity. All of the water flowing in Little Butte Creek (except in extreme high water periods, when the amount of water in the creek exceeds the capacity of the ditch) is required for these purposes, and in summer there is scarcely enough water to supply the irrigators at Paradise.

Complainant's right both to the ditch and to the water of Little Butte Creek is shown not only by this long period of adverse user—over a quarter of a century—with payment of all taxes, but it is also the owner *of record* of both the Powers Ditch and water right and of the Nickerson Ditch and water right. It will be unnecessary here to trace the deraignment of title to said ditches and water rights, but reference may be made to the findings of the Master at pages 46 and 47 of the record, and to pages 304 to 310 and 357 to 368, where such deraignment appears.

In this connection, it may be noted that on page 15 of the brief for appellant, it is stated that the Powers Ditch "does not seem to have been included

in the conveyance of the Oro Water Light and Power Company to Oro Electric Corporation". Counsel, however, are mistaken in this, since the description in said conveyance included the Walker and Wilson or West Ditch, which, as above stated, are the names by which the Powers Ditch was formerly known (Findings, p. 46).

It may also be mentioned that while, as pointed out in the brief for appellant (p. 15), no conveyance of the Powers Ditch appears from Walter Cutting to Oroville Water Company, none was necessary, since for many years prior to the conveyance made by Cutting to Oroville Water Company, in April, 1898, covering the Nickerson Ditch and the water rights appurtenant thereto (Tr. p. 362), all of the water of Little Butte Creek had been carried down the Nickerson Ditch,—the upper portion of the Powers Ditch having been abandoned much earlier, as just stated. When, therefore, Cutting conveyed the Nickerson Ditch and water right to the Oroville Water Company, such conveyance carried with it as appurtenant to said ditch, all his rights in the waters of Little Butte Creek which were formerly appurtenant to the Powers Ditch.

Lower etc. Ditch Co. v. Kings River etc. Co., 60 Cal. 408;

Williams v. Harter, 121 Cal. 47, 51.

It may also be mentioned here that the Snow Ditch referred to in the brief for appellant (p. 9), fell out of repair and ceased to be used at about the same date that the Powers Ditch fell out of repair

(1890) (Findings, Tr. p. 50). It thus appears—as already stated—that from the year 1890 to the time of the commencement of the action, all of the water flowing in Little Butte Creek (excepting only that flowing therein at extreme high water) was carried down the Nickerson Ditch and sold by complainant, or its predecessors, for irrigating, or used by it in generating electricity which was sold to the public.

The defendant's rights are claimed to have been initiated by the posting by George B. Mowry, on March 17, 1899, of a notice of appropriation on Little Butte Creek below the head dam of the Nickerson Ditch at the point where the intake of the old Powers Ditch had formerly been located. The amount of water so appropriated, as stated in the notice, was 500 inches measured under a four-inch pressure (Tr. p. 135). It clearly appears, however, that at that date there was no such amount of water flowing in Little Butte Creek below the head dam of the Nickerson Ditch, the only water which flowed there being such as was made up from springs and from seepage through said head dam. The evidence further shows that when this appropriation was made, Mowry fully realized that the entire flow of the creek had for many years been carried down the Nickerson Ditch and that he stated at the time he posted the notice of appropriation that his purpose in so doing was to obtain some "winter water" and thus save buying water (Findings, Tr. p. 52). Mowry thereafter rehabilitated to a certain extent the upper portion of said ditch, and

used, for a short time, such water as he could obtain therein, when he was obliged to discontinue such use by reason of the upper portion of the ditch falling into disrepair. No conveyance to defendant of any rights which Mowry may have obtained by this appropriation appears in the record (Findings, p. 53).

For a time thereafter the Mining Company purchased water from the owners of the Nickerson Ditch, paying them a flat rate of fifty dollars per month therefor, which was later raised to seventy-five dollars per month (Findings, Tr. p. 54). At a subsequent date, the Mining Company (as the Master found, Tr. p. 58) commenced surreptitiously to take water from the ditch. The evidence in this regard showed that its employees were instructed to open a spillway in the Nickerson Ditch not far from defendant's mine, and to permit water to flow from the ditch to the mine for periods of about fifteen or twenty minutes at a time, the object being in this way to prevent complainant's ditch tender, who was engaged in the performance of his duties near Paradise, from detecting the loss of the water. The record further shows that whenever complainant's officers and employees discovered that the spillway was open, they closed the same; that notices were posted at the spillway prohibiting further interference with the ditch, and that numerous other attempts were made by it to stop interference with the supply of water. Finally, in the summer of 1912, when the irrigators at Paradise were urgently

in need of water for their crops, defendant openly shut off the supply of water in the ditch by opening the spillway, causing all of the water in the ditch to be conveyed to the mine—with the result, as testified to by some of the witnesses at the trial, that tons of fruit and berries at Paradise were lost. The evidence further shows that by far the greater portion of the water thus taken by defendant was wasted. Complaints having been made by the farmers at Paradise both to complainant and to the Railroad Commission, this suit was commenced.

Argument.

In the following pages, each of the propositions discussed in appellee's brief will be considered in the order in which they are therein stated.

I.

THE LEGAL PRINCIPLES ADOPTED BY THE COURT AND APPLIED BY IT IN THE CONDUCT OF THE TRIAL, AND IN THE FINAL DETERMINATION OF THE CASE, WERE NOT ERRONEOUS.

On pages 32 to 67 of appellee's brief will be found discussed four legal propositions in respect of which it is claimed that the court below erred. It will be convenient to postpone detailed consideration of the opening pages of appellee's argument in this connection (pp. 42 to 45) until the consideration of the particular proposition in question which is

claimed to have been erroneously determined in the court below is considered. We pass, therefore, to the first of these propositions.

A

The court did not err in ruling that complainant had made out a prima facie case, and that the burden was upon it to justify its acts.

It will be seen from an examination of the record (pp. 108-110) that at the opening of the hearing the following facts stood admitted by the pleadings or the stipulations of counsel, viz.: the incorporation and citizenship of the parties, that the plaintiff was engaged in the business of selling to the public, water for irrigation, and other beneficial purposes, and electricity for light, heat and power; that complainant was the owner of the Nickerson Ditch; that the defendant asserted some claim to a portion of said ditch and claimed the right to enter upon and take water from it without making compensation to complainant; and that at divers times during the months of April, May, June, July, August, September and October, 1912, it had repeatedly and without right, and against the command of complainant entered upon and taken water therefrom. It also appeared that the matter in dispute exclusive of interest and costs, exceeded the sum of three thousand dollars, and that the defendant threatened to continue to assert said claims and to enter upon and interfere with said ditch, and to take water therefrom against the consent of complainant and without making compensation therefor, and that it

would continue so to do unless restrained by injunction, etc.

In short, substantially all of the allegations of the bill were admitted either by the answer or by the stipulation of the parties at the hearing. It therefore clearly devolved upon defendant to justify, if it could, the acts complained of. For this purpose, the defendant pleaded six affirmative defenses. It was, therefore, incumbent upon it to establish these defenses, or one of them, by evidence, and it was not necessary that plaintiff should proceed to disprove them until defendant had introduced evidence in their support.

J. M. Robinson and Norton Co. v. Tuscaloosa (C. C. A. 5th Cir.), 53 Fed. 966, 970;
Lilienthals Tobacco v. United States, 97 U. S. 266.

We, therefore, respectfully submit, that no error was committed by the Master in denying defendant's motion to dismiss (Tr. p. 110). If, however, we are mistaken in stating that it was necessary for defendant to justify its acts, it is abundantly clear that the ruling complained of was entirely without prejudice to the defendant, as will be seen from the following excerpt from the Master's report (p. 29):

> "While I see no error in the ruling requiring the defendant to go forward with the evidence, it must be pointed out that the ruling did not touch the question of the ultimate burden of proof, which, of course remained with the plaintiff. Furthermore, if there was any error

in the ruling, it simply affected the order of proof, which was in the discretion of the Master; and if any harm was thereby done to defendant's presentation it was remedied by the Master's liberality in allowing defendant to offer full proofs in later stages of the hearing."

We pass, therefore, to the second proposition which it is claimed was erroneously decided by the court below.

B

The court did not err in holding that the allegation of defendant's "second affirmative defense" did not constitute a defense to the suit.

The argument of appellee upon this point will be found at pages 48 to 54 of its brief, where the theory is advanced that defendant was entitled to forcibly enter upon and "recapture" "its" water flowing in the Nickerson Ditch. Our answer to this proposition will be made under the following headings:

(1) Even had defendant established that its right to the use of the water of Little Butte Creek was superior to that of the complainant, this would not have justified its entry upon plaintiff's ditch.

(2) The "recapture defense" fails, also, since the water flowing in plaintiff's ditch did not belong to defendant. This follows from each of the following propositions:

(a) Defendant could acquire no title to the water while it was flowing in the stream, or until it was diverted into its ditch.

(b) Complainant's rights in Little Butte Creek were superior to those of defendants.

(3) Since the water claimed to have been "recaptured" was dedicated to public use, the defendant's remedy, if any, was an action for damages.

These propositions will be considered in the order stated.

---

1. Even had the defendant established that its right to the use of the water of Little Butte Creek was superior to that of the complainant, this would not have justified its entry upon plaintiff's ditch.

It will be borne in mind that the rights of defendant in the land owned by it were acquired long subsequent to the construction of the Nickerson Ditch (Findings, Tr. p. 46). Under the established rule, therefore, defendant's title was taken subject to the right of way for the existing ditch, the latter, under the legislation of Congress, being regarded as a vested right at the date of the issuance of the patent.

Jennison v. Kirk, 98 U. S. 453;
Jacob v. Day, 111 Cal. 571;
Jacobs v. Lorenz, 98 Cal. 332.

The case is precisely the same, therefore, as if the owner of the land through which the ditch passed had granted to plaintiff's predecessor a right of way therefor. If such grant had been made, no one, we suppose, would attempt to claim a right in the

grantor to thereafter flow any water in the ditch or exercise any other act of ownership in reference thereto. When the patent issued from the government to defendant's predecessor, the latter was in no better position than if it had, itself, made the grant of the right of way. It and its successors thereafter held the land subject to the existing ditch right, and they owed to the owner of the ditch the same duties that they would have owed, had they, and not the government, been the source of title to the ditch.

The complainant owned not only the right to flow water in the ditch, but it possessed, also, as an essential part of its right, the right to have the entire ditch preserved and maintained. Any encroachment upon the ditch—any interference with its sides, banks, spillways or outlets—constituted an invasion of its rights. If such invasion continued for a sufficiently long period it would ripen into a prescriptive right, and the complainant was therefore justified in resisting any invasion whatever, regardless of whether the invader was the owner of the land through which the ditch ran, and regardless, also, of the extent of the invasion, or the amount of damage resulting therefrom.

The right to the ditch is an entirely different thing from the right to the water flowing therein—as different as the ditch itself is from the water. As said in *McLear v. Hapgood,* 85 Cal. 555, 556, "the ownership of the ditch is entirely distinct from the right to divert the water of the stream". "Ownership of a ditch and the water right for

waters to flow through the ditch," said the Supreme Court of Idaho in *Swank v. Sweetwater etc Co.,* 98 Pac. 297, "may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party."

In *17 Am. & Eng. Ency. Law,* p. 513, it is said:

> "An irrigating ditch or an interest therein is real estate. Physically, of course, a ditch is a part of the land upon which it is dug or constructed, but the ditch and the land on which it is situated may be owned by different persons. So, too, the ownership of a ditch may be entirely distinct from the right to divert the water. *One may own an irrigating ditch without owning a water right, and may protect it from injury."*
>
> (Italics throughout this brief are ours.)

The distinction here adverted to is clearly set forth in the case of *Nevada etc. Co. v. Kidd,* 37 Cal. 282, 309, cited by appellant. Said Chief Justice Sawyer in that case (p. 307):

> "If an action of trespass is not sufficient, it is plain that an action to recover possession of the dam site and dam in process of construction, and of the canal site and canal thereon projected, surveyed, and commenced, would afford a complete and adequate remedy for any injury averred, or that is likely to arise, till the plaintiff is in a condition to use the water, or be injured by its diversion from it by defendants.
>
> * * * * * * *
>
> "The water right, when acquired, although intimately related to and connected with the site for a dam and canal, and dam and canal

commenced, etc., is a different thing, even though each may be necessary to make the other available or useful. They are capable of several and distinct injuries, giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. *The dam and canal may be trespassed upon, broken down, destroyed or taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning plaintiff's right to it, and plaintiff may have its action for the trespass, or to recover the possession of the land constituting the dam and canal, or their site; and the water may, also, be diverted and taken away without in any way disturbing or interfering with the dam and canal. The possession and right of possession of the dam site and dam, and canal site and canal may exist, and a cause of action arise for trespass or ouster long before any present water right capable of injury by diversion and use by other parties has any existence.*"

And again on page 315, the writer of the opinion says:

"So, if, before the right of plaintiff to the water should have become perfected, while constructing its dam and canal, with a view to a future diversion and actual appropriation of the water, the defendants should trespass upon and destroy the works, or take possession of the site, a cause of action would arise, but it would be an entirely different cause of action from the other arising from a diversion of the water, and not identical with it in law, or in fact. An action for damages for the injury done, or to recover the possession of the site, would be the remedy. The right to the water does not *yet exist, and it may never vest.* The most that is *in esse,* is, a *right to acquire, by reasonable dili-*

> *gence, a future right to the water.* The remedy for the two kinds of injury might be different, and the measure of damages would certainly be different, and would require different evidence."

Since, as appears from the last cited case, a trespass may be committed even upon a ditch containing no water, it is evident that the right of the owner of the ditch to its exclusive possession does not depend upon whether there is any particular amount of water in the ditch at any particular time, nor upon whether he owns any water whatever in the ditch. Neither would an entry upon the ditch be justified because it appeared that the water in the ditch was owned by the party making the entry.

The case last cited is an authority, also, upon the proposition that ejectment will lie to recover a ditch; and this is the doctrine both of the California courts and of this court in cases which, like the one at bar, are controlled by the California law. The established rule in this state is that the owner of the ditch is entitled to the exclusive possession thereof.

In *Integral etc. Co. v. Altoona etc. Co.,* 75 Fed. 379, it was held that an action to recover a certain ditch and the water rights appurtenant thereto known as the "Boston Ditch" was "a suit, not for an incorporeal hereditament merely, *but for the ditch itself, and that the action of ejectment would therefore lie".* In the course of his opinion, Judge Gilbert used the following language:

"Mr. Pomeroy, in his work on Water Rights (section 59) says:

'There is, of course, a plain distinction between the appropriator's right to the water which he diverts and his right to the canal, ditch, reservoir, or other structure through which the water is conveyed. *A ditch or canal itself, used for conveying the water to a mine or elsewhere, is not a mere easement or incorporeal hereditament; it is land.*'"

After referring to the cases of *Reed v. Spicer,* 27 Cal. 58, *Canal Co. v. Kidd,* 37 Cal. 282, and *Mitchell v. Mining Co.,* 75 Cal. 464, the writer of the opinion concludes as follows:

"These decisions are sufficient to establish the doctrine that in California, at least, recovery may be had in ejectment of property such as that described in the complaint in this case. No demurrer was made to the complaint in the court below, nor does it appear that the point here presented was made either on the trial below or in the assignments of error. We have given the question the same consideration, however, to which it would have been entitled had timely objection been made. Undoubtedly, the plaintiff in ejectment, suing for property described as that which is sued for in this case, will, upon his judgment, acquire possession of the ditch wherein the water runs, and of the water running therein, and of the soil beneath, as well as the banks that hold it."

In *Trippe v. Overacker,* (Colo.) 1 Pac. 695, 697, it was said:

"The proprietor of an irrigating ditch, whether upon his own premises or those of another, has a property ownership, *both in the*

> *ditch and the right of way therefor, and using or enlarging such ditch without the owner's consent is as much a taking or damaging of private property, within the meaning of the constitution, as would be appropriating the right of way therefor in the first instance.*"

The authorities cited show that the right of the complainant was exclusive, and entitled it to the possession of the entire ditch, and that it could have maintained an action of ejectment therefor. It was not obligated to share its ditch with the defendant. Indeed, it would have wholly defeated the purpose for which Congress authorized the granting of rights of way for ditches on the public lands, if it were held that they may be used by the owner of the lands through which they run jointly with the owner of the right of way. Who, we may ask, would avail himself of the privilege of constructing a ditch under these circumstances? It is entirely safe to say that it was never intended by Congress that one who had paid no part of the cost of constructing a ditch—who was not even the owner of the land when it was constructed—could claim the right to use it jointly with its owner.

The right of complainant is comparable with the right obtained by a railroad company for its right of way, in reference to which it was said in *Townsend v. New York etc. R. R. Co.,* 106 N. Y. Supp. 381, 387:

> "While this easement exists, the defendant is entitled to the exclusive use, possession, and control of the land; and the owner of the fee

> has no right to use, occupy, or interfere with the same in any manner whatever."

In the case of *Northern Pacific Ry. Co. v. North American Tel. Co.,* (C. C. A. 8th Cir.) 230 Fed. 347, decided December 15, 1916, Circuit Judge Sanborn, delivering the opinion of the Circuit Court of Appeals for the 8th Circuit, said:

> "A railway company, which has become the owner of a railroad which it is operating and of a right of way appurtenant thereto, has the *exclusive* right to the use of that right of way for telegraph purposes as well as for railroad purposes."

See, also,

Southern Pacific Co. v. Burr, 86 Cal. 279.

In *Silver Creek etc. Co. v. Hayes,* 113 Cal. 142, the plaintiffs, who owned a canal, sued the defendants, alleging that they, the plaintiffs, were in possession of said canal and that the defendants without permission from the plaintiffs, had wrongfully entered upon the same, and taken water therefrom. In a cross-complaint, the defendants set up that they owned a large tract of land which it was necessary to irrigate, and that the only waters available for that purpose were the waters of Panoche Creek. It was further alleged that the rights of the defendant to Panoche Creek were superior to the rights of plaintiffs therein.

In holding that the facts stated would not justify the acts complained of by plaintiffs, the Supreme Court of California, speaking through Judge Temple, said:

"No right to water is asserted, nor was it necessary for plaintiffs in order to make a case to show any. The court so held in giving them the relief demanded, while finding that they had no right to water in the creek. The trespass charged did not consist in destroying or injuring the dam or other means by which the water was diverted from the creek, nor in diverting the water in the creek to other uses, but was an injury to the embankments of the ditch and a taking of the water from the ditch itself. Had the alleged trespass consisted in an attempt to prevent the flow into the ditch from the stream, possibly the assertion of a right to have the water flow would be considered, but no such defense could be made here. The cause of action set up by plaintiffs and the rights asserted by defendant have no reference to each other. True, there was water in the ditch, and the evidence shows that it came from Panoche Creek. But the fact that defendant had a superior right to the water flowing in the creek would not justify him in destroying the ditch, or in taking what water he needed from the ditch at points where it passed over or near his land."

Hayois v. Salt River Valley Canal Co., (Ariz.) 71 Pac. 944, was a suit by the Salt River Valley Canal Co. to enjoin defendants from entering upon an irrigating ditch or canal owned by plaintiff, or interfering with the headgates therein or in any manner obstructing plaintiff from the operation thereof. The complaint set forth the ownership and possession of the ditch by plaintiff; that the defendants had entered into an agreement to enter upon the canal and divert water therefrom to their own use; and that the threatened

acts would result in irreparable damage and injury to plaintiff, etc. The defendants set up in their cross-complaint that they were the owners of certain lands which were irrigated by means of said canal, and that they were also the owners of a portion of the water flowing in the canal. A demurrer to the cross-complaint was sustained by the trial court, and, after trial, judgment passed in favor of the plaintiff. The defendants appealed from this judgment to the Supreme Court of Arizona.

In affirming the judgment, the court said:

> "The new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it, in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it, in respect to the cause of action on which the complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this, and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant or one or more of his co-defendants, his pleading will not be a cross-bill, but an original bill. Enc. Pl. & Pr., vol. 5, p. 640, and cases there cited. The plaintiff's action was brought for the purpose of restraining the defendants from breaking the head gates and interfering with the management of its canal. To the determination of this controversy all questions relating to the ownership of the water were wholly immaterial. It was the ownership of the canal, and not the water, which constituted the basis of the plaintiff's right to the relief it was asking. *A de-*

termination most favorable to the defendants of the various questions sought to be injected by the cross-complaint would have failed to show that they had any interest in the canal, or lawful warrant for interfering with the management and control thereof; and, since the settlement of these questions could have no possible bearing upon the plaintiff's cause of action, they were not matters which could be properly adjudicated in this suit. As was said by the learned judge of the trial court in his opinion: 'Whether they (defendants) are the oldest settlers in the valley, whether they are the first appropriators of water from the Salt river, whether they have an absolute and unquestioned right to the water, no one has the right to forcibly break open the head gates of the canal, or divert water therefrom, in interference with the established rules and regulations of the canal company, because he is not getting the water to which he may be entitled. To hold otherwise, or to allow each user of water to judge for himself of when and how he may use and divert water carried in a canal, and how much he may use, and to exercise such judgment by opening this or that head gate, in opposition to the canal company's management, would be productive of such confusion, waste, ill feeling, and probable violence as to make it impossible for a court to sanction it, on the ground of public policy alone, if on no other ground.' The matters contained in the cross-complaint had no relevancy to the plaintiff's cause of action, and the trial court properly sustained the demurrer thereto."

Stocker v. Kirtley, (Idaho) 59 Pac. 891, was a suit by the owner of a ditch for an injunction restraining defendant from interfering with the ditch. In delivering the opinion of the Supreme Court of Idaho, Sullivan, J., said:

> "The primary object of this action was to restrain appellant from filling respondent's ditch with placer-mining debris, from running the same on his land, and for damages. Those are the only reliefs specifically prayed for.
> * * * * * *
>
> *It is not essential to the recovery of the specific relief prayed for that respondent establish the allegations of his complaint as to his prior and superior right to any of the waters of said creek, as one may own a ditch, or a ditch and land, independent of a water right, and may protect them from injury.*"

We may add that even if it were conceded that defendant possessed originally the rights in the ditch which its counsel claims for it, they were extinguished by the long period of adverse user by complainant's predecessors. This user, as we have shown, was exclusive and adverse to the entire world, including defendant and its predecessors.

Campbell v. West, 44 Cal. 646.

The cases cited in appellant's brief on pages 40 and 41, so far from laying down any rule which is opposed to our position, in reality strengthens it, for they show that the owner of the land through which a ditch passes is not entitled to the use of it, unless he has acquired such right either by grant or prescription; *and here there is no proof of either.*

Inasmuch as the "defense" now under consideration is predicated largely upon the claim that during the year 1906 the complainant enlarged the Nicker-

son Ditch, it is proper that the evidence bearing upon the point should be briefly adverted to.

That the ditch was not enlarged conclusively appears, we think, from the testimony of defendant's witnesses, as well as from the evidence introduced by plaintiff. Mr. North (a witness for defendant) who constructed the ditch, stated that it was well constructed (Tr. p. 93), and that as constructed its depth below the "thorough-cut" or graded surface was 3 feet; its width on the bottom was 3 feet, and its width, *measured on the thorough-cut,* was 5 feet (Tr. p. 128). The grade, he testified, was 9.60 feet to the mile (Tr. p. 128); while its capacity, after it had sufficiently settled, was estimated at 1300 inches (Tr. p. 133).

Now, the testimony of Mr. Durbrow, which is undisputed, shows that a ditch of the dimensions testified to by defendant's witnesses, would have a capacity of 1740 inches (Tr. p. 193). This computation was made upon the estimate of Mr. North that the grade of the ditch was 9.60 feet to the mile. In point of fact, however, the grade was more, as shown by the undisputed testimony, all of which indicates that Mr. North somewhat underestimated the capacity of the ditch as originally constructed (Tr. p. 175).

Be that as it may, even if Mr. North's estimate of 1300 inches is accepted, it is clear that there has been no substantial enlargement of the ditch, for the testimony shows that today its capacity does

not exceed 1425 inches (see testimony of Gradon, Tr. p. 177, Huber, Tr. p. 326, Davis, Tr. p. 127). That the capacity of the ditch has not been enlarged is further confirmed by the fact that no witness was able to testify that he saw any enlargement made between the spillway and the head dam, and no witness pretended to have taken any measurements before and after the alleged enlargement (see testimony of Moody that today the ditch would "economically back 1600 inches", Tr. p. 120); and his testimony relative to the old frame in the ditch (Tr. p. 120).

Mr. Davis, who was called and testified on behalf of defendant, stated that the capacity of the ditch was from 1200 to 1500 inches, which is less than North's estimate as to the original capacity. He, moreover, testified that there was no enlargement of the ditch (Tr. p. 280). Mr. Durbrow was in full charge and knew what was done and what moneys were expended. He testified positively that there was no enlargement (Tr. p. 192). His testimony likewise explains how any changes in the form of the ditch occurred, and shows, together with the testimony as to the user and payment of taxes by plaintiff, and its predecessors, that if any change had taken place, plaintiff's predecessors acquired a title to the ditch in its new condition by adverse possession. The testimony given by Gradon, Beik and Lincoln also confirms the correctness of the conclusion that no material enlargement of the ditch has taken place. The testimony of William Hen-

drix (Tr. p. 254) and J. W. Goodwin (Tr. p. 317) is to the same effect.

Again, the ditch, as originally constructed, was admittedly of sufficient size to carry all the water flowing in Little Butte in the summer time. The alleged enlargement, therefore, could not have resulted in taking additional water, as claimed in the answer (p. 13) and as testified to by Mr. Mowry. The only way in which a diversion of the water could have been created was by rebuilding the old dam or putting in a new one, and there is no testimony that that was done. It is true that Mr. Moody suggests that this was the case, but no one else dared go that far, and Moody himself subsequently withdrew his testimony on that point.

That slight changes do not invade any of the rights of the owner of the servient estate, see

9 Ruling Case Law, p. 789,

where it is said:

> "But when the change in the condition of the dominant estate effects a change in the degree of use and not in the kind of use, it seems that the right of way by prescription is not effected."

See also cases collected in note: Ann. Cas. 1914 C, p. 472.

In this connection, it may be noted that it is a *non sequitur* to say that an unlawful enlargement of a ditch gives the land owner any interest in the ditch or in the water flowing therein. The most he could claim would be that he was entitled

either to prevent, by force or by a writ of injunction, any material enlargement or, if the enlargement had actually been made, to restore the old condition, if this could be done without damaging the ditch. It may be admitted that notwithstanding the enlargement, the owner might use his land thus unlawfully encroached upon in any way he chose (provided the ditch right to which the other party was lawfully entitled was not impaired, in which case he in turn would become a wrongdoer), but this would not entitle him to use the entire ditch; nor would it give him any interest therein. If this were the law, for property of the value of $100 he might become entitled to an interest in a ditch worth half a million dollars. No citation is required for the proposition that an owner of an easement, who, without right, attempts to extend it to the prejudice of the owner of the servient estate does not forfeit his rights.

It is, therefore, respectfully submitted that the court below did not err in holding that the "second affirmative defense" pleaded in defendant's answer did not constitute a defense to this suit.

2. Until water is actually diverted by one into his ditch or upon his land, he obtains no ownership thereof or title thereto. The defendant, therefore, was not the owner of any water flowing in complainant's ditch and for that reason there is no basis for the existence of the claimed right of "recapture".

On pages 51 and 52 of the brief for appellant, the doctrine of "recapture" of chattels is sought to be

applied to this case. It is a sufficient answer to this claim, we think, to call attention to the rule that there can be no ownership of water by one until it has reached his land or been diverted into his ditch. "Neither a riparian proprietor nor an appropriator," said Judge Shaw, delivering the opinion of the Supreme Court in *Duckworth v. Watsonville etc. Co.,* 150 Cal. 520, 525, "has title or ownership in the water of a stream before it reaches his land, or point of diversion respectively." The same rule is laid down in *Parks etc. Co. v. Hoyt,* 57 Cal. 46, and a host of other cases.

If this be the correct rule, it is clear that the foundation for the application of appellant's "recapture theory" entirely fails, for the latter is predicated upon the ownership of the chattel by the party reclaiming it. Without such ownership, there can, of course, be no possible basis for the contention here advanced.

3. Defendant's theory of "recapture" fails, also, because the prior rights of complainant to the use of the waters of Little Butte Creek are established by the overwhelming weight of the testimony to be prior to those of defendant.

The Master, it is true, declined to find upon this issue, since his determination of other points made that unnecessary. He found, however,—as we shall now proceed to show—facts from which the legal conclusion that complainant's rights in the waters of Little Butte Creek are superior to those of de-

fendant inevitably follows. And these findings, we shall also show, are supported by the overwhelming weight of the evidence.

We have already had occasion to advert to the finding "that after 1890, when the Powers Ditch went out of repair, the Nickerson Ditch took all the water in summer flowing in Little Butte Creek at the Nickerson Dam" (Tr. p. 50). Again, referring to the appropriation made by Mr. Mowry in 1899 near the intake of the old Powers Ditch (Tr. p. 50) the Master found that "for at least nine years all the water in Little Butte had passed down the Nickerson Ditch in summer time and for the same period of time the Snow Ditch water had not come into Little Butte". And on page 53 of the record, speaking of the old upper Powers Ditch which had been rehabilitated by Mowry, he said:

> "It is clear at any rate that during the summer time no water ran in it during this period except such water as was made by springs or other seepage below the Nickerson head-dam."

The adverse user of the water of Little Butte Creek during this period of over twenty-five years, as established by their findings, undoubtedly shows a prescriptive right in the predecessors of complainant to the use of the entire flow of said stream.

A brief reference to the evidence will suffice to show that it fully supports the above finding. The Powers (or Walker & West) Ditch and water

right, as it is variously called, are very old (see *Campbell v. West,* 44 Cal. 646, decided in October, 1872). The evidence shows that for many years prior to the construction of the Nickerson Ditch, the Powers Ditch took all of the natural flow of Little Butte in the summer (see testimony of Wm. S. Hendrix, Tr. p. 248; testimony of C. M. Hendrix, Tr. pp.....; testimony of North, Tr. p. 266).

Very shortly after the construction of the Nickerson Ditch, the upper end of the Powers Ditch was abandoned. And from that time on, all of the water of Little Butte Creek (except that flowing therein in periods of high water when the amount of water in Little Butte Creek at the Nickerson head-dam exceeded the capacity of the Nickerson Ditch), was carried down the Nickerson Ditch. Unquestionably, this user was adverse to the world, including defendant, and resulted in vesting in complainant's predecessors a valid prescriptive title to the use of the water.

Smith v. Hawkins, 110 Cal. 122;
Alta etc. Co. v. Hancock, 85 Cal. 219.

See testimony of Wm. S. Hendrix, Tr. p. 248; C. M. Hendrix, Tr. p. 266; Davis, Tr. p. 280; North, Tr. pp. 289, 291; Durbrow, Tr. p. 188; Green, Tr. p. 300; Fogg, Tr. p. 310; and Goodwin, Tr. p. 317.

The record establishes, too, a record title in complainant, both to the Powers Ditch and water right, and to the Nickerson Ditch and water right (Tr.

pp. 357-368, 304-310). It will thus be seen that plaintiff's rights in the Little Butte Creek water outrank by many years any claim of Mowry thereto. The latter's claim dates only from March, 1899 (Tr. p. 135).

We submit, therefore, that the defendant wholly failed to establish its claim of priority in the waters of Little Butte Creek.

4. Since the water in question was devoted to public use, defendant could not retake or "recapture" it, but its remedy, if any, was an action for damages.

It will be sufficient here merely to cite some of the authorities which lay down this well settled proposition.

Crescent Canal Co. v. Montgomery, 149 Cal. 252;

Barton v. Riverside, 155 Cal. 513;

Gurnsey v. Northern Cal. Power Co., 160 Cal. 710.

C.

The court did not err in holding that the "third affirmative defense" of defendant was invalid in law.

For our answer to this proposition advanced by appellant in this connection, we respectfully refer the court to the preceding pages of this brief. In addition, a word may be added relative to the case of *Hoyt v. Hart,* 149 Cal. 722, which is so strongly relied upon by appellant.

We think that even the slightest examination will be sufficient to show that this case does not lay

down any proposition which is opposed to our position. All that was there held was that it was legally possible for two parties to both own an interest in and have the right to use a ditch. This proposition, it seems hardly necessary to say, appellee has never denied. That is an entirely different question, however, from the one whether the defendant in the case at bar has, *in fact,* acquired a joint right with complainant in the Nickerson Ditch. In the case of *Fox River etc. Paper Co. v. Kelly,* 35 N. W. 744, 749, it was said:

> "The courts hold that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbor's land, do not stand upon the same ground. *Greatrex v. Hayward,* 8 Exch. 291; *Wood v. Waud,* 3 Exch. 743; *Magor v. Chadwick,* 11 Adol. & E. 571; *Sutclife v. Booth,* 32 Law J. Q. B. 136; *Ramchur Pershad Narain Singh v. Koonj Behari Pattuck,* 31 Moak, 771, 33 Moak, 91. In the former case, each riparian proprietor *prima facie* is entitled to the unimpeded flow of the water in its natural channel, *while in the latter case any right to the flow must rest on some grant or arrangement either proven or presumed from or with the owner of the land from which the water is artificially brought, or some other legal origin.*"

In the case at bar, admittedly, defendant has obtained no conveyance of the right to take water from complainant's ditch; nor has it acquired such right by prescription; and when it acquired its title to the land from the government, it took its subject

to the ditch-right, which was then vested in the predecessors of the complainant. We respectfully submit, therefore, that the case cited furnishes no support for appellant's contention.

D.

The court did not err in failing (as contended by appellant) to find in the decree the nature and extent of complainant's rights.

This proposition having (as we think) been fully answered in the preceding pages of this brief, the argument is respectfully rested thereon.

II.

THE COURT DID NOT ERR IN HOLDING THAT DEFENDANT DID NOT HAVE A PRESCRIPTIVE RIGHT TO USE THE NICKERSON DITCH OR TAKE WATER THEREFROM EXCEPT UPON PAYING THE LAWFUL RATES THEREFOR.

This subject will be found discussed in the brief for appellant at pages 67 to 77.

It is the settled rule that the proof to establish title by adverse possession must be clear and satisfactory.

Clarke v. Clarke, 133 Cal. 669.

In *Snyder v. Colorado etc. Co.,* 181 Fed. 62, 70, Judge Van Devanter said:

> "The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but regards them as of no validity against those whose property is

> the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost."

1. Defendant's use was not open, continuous, peaceable or adverse.

It is equally well established that, as said by the Supreme Court of California, in *Thomas v. England,* 71 Cal. 460,

> "To perfect an easement by occupancy for five years, the enjoyment must be *adverse, continuous, open, peaceable.*"

In the language of the same court in *Bree v. Wheeler,* 129 Cal. 147,

> "Interruption of adverse user, however slight, prevents acquisition of title by prescription."

See also:

American Co. v. Bradford, 27 Cal. 368;
Cave v. Crafts, 53 Cal. 138;
Ball v. Kehl, 95 Cal. 613;
Union Mining Co. v. Dangberg, 81 Fed. 91; (Opinion by Hawley, J.).

Now it cannot be claimed that defendant's use was adverse to plaintiff's predecessors while the water was being paid for by defendant, nor before plaintiff's predecessors were notified by the alleged adverse character of the user.

Ball v. Kehl, 95 Cal. 613;
Unger v. Mooney, 63 Cal. 592;
Tarpey v. Veitch, 22 Cal. App. 292.

The fact that defendant paid for the water for a number of years preceding the close of the year 1905 is thoroughly established by the evidence (Tr. p. 189, Durbrow; Tr. p. 315, Goodwin; Tr. p. 311, Fogg; Tr. p. 302, Peters). The claim of Mowry that he was paying for the use of the *ditch* and not for the use of the water, under an agreement with Mr. Smith, now deceased, is shown to be untenable by all of the evidence in the case. See letter of Mowry (Tr. p. 54); testimony of Durbrow (Tr. p. 190), and Peters (Tr. p. 302), relative to form of bills paid by Mowry; testimony of Fogg (Tr. p. 311); Hendrix (Tr. p. 250); Goodwin (Tr. p. 315).

As to the period after the end of 1905, when the payments ceased, it would be an abuse of language to say that the use of the water made by defendant since 1905 and down to the month of November, 1912, when the action was commenced, was either adverse, continuous, uninterrupted or peaceable. Until after April, 1909, if any water was taken it was taken surreptitiously (Durbrow, Tr. p. 190; Beik, Tr. pp. 216-218; Lincoln, Tr. pp. 228-230). After 1909 to the time of the commencement of the action there were numerous interruptions (Beik, Tr. pp. 214-219; Davis, Tr. pp. 277-288; Lincoln, Tr. pp. 227-230). These interruptions are admitted even by Mowry (Tr. pp. 146-152). Until 1912 no water was taken in the summer time. In fact, the cross-gate at the spillway not having been put in until August, 1912, at least 75 inches of water

in the ditch must have flowed past the spillway prior to that time (Tr. p. 235). The testimony clearly shows that defendant's user was frequently interrupted and that it did not exist in the summer time prior to 1912.

2. The taxes have all been paid by plaintiff and its predecessors, and no taxes have been paid by defendant.

On this point the Master found that

> "all taxes since 1888 assessed against the Nickerson Ditch have been paid by the plaintiff or its predecessors and that no taxes on said ditch have been paid by the defendant" (Tr. p. 60).

3. A very insignificant part of the water taken by defendant has been put to beneficial use.

See testimony of William S. Hendrix (Tr. p. 254), that defendant required only 40 or 50 inches of water while it was "washing" which occupied only an hour or an hour and a half daily. See also testimony of Mowry (Tr. p. 144), C. M. Hendrix, (Tr. p. 269). On the other hand, the farmers at Paradise urgently need the water.

As to the requirement that the water should be put to a beneficial use by one claiming a prescriptive title thereto, see

California Pastoral Co. v. Madera Canal Co., 167 Cal. 78.

4. Both the ditch and water were dedicated to public use and no prescriptive right therefore could be acquired in either so long as such use continued.

Southern Pacific Co. v. Hyatt, 132 Cal. 240; *Leavitt v. Lassen Irrigation Co.,* 157 Cal. 82.

The water, dedicated as it was to public use, admittedly could not lose its character by a conveyance executed by the owner. Nor could the owner indirectly destroy the public right by permitting an adverse user.

III.

THE COURT DID NOT ERR IN HOLDING THAT COMPLAINANT WAS NOT GUILTY OF LACHES OR OF INEQUITABLE CONDUCT.

The argument of appellant in this connection may be found at pages 77 and 78 of its brief. We are content to submit the same without discussion.

In conclusion, it is respectfully submitted that the position of defendant in its controversy with complainant and the farmers at Paradise is wholly wanting in equity, that it was rightly enjoined from interfering with complainant's ditch or taking water therefrom, except upon paying the lawful rates, and that the decree appealed from should be affirmed.

Dated, San Francisco,
May 28, 1917.

Respectfully submitted,

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